Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	CS Docket No. 96-60
	)	
Leased Commercial Access	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

REPLY COMMENTS OF VALUEVISION INTERNATIONAL, INC.

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Summary

The initial comments of ValueVision International, Inc. ("ValueVision") demonstrated that, with minor modifications, the Commission's proposal in this proceeding is in full compliance with the mandate of the governing statutes and its prompt implementation would be in the public interest. In these reply comments, we show that some cable operators and their supporters have inappropriately invited the Commission to disregard the congressional mandate and to permit cable systems to continue their restrictive leased access policies.

Cable operators and programmers in effect ask the Commission to refuse to carry out the explicit requirements of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[1] as reaffirmed in the Telecommunications Act of 1996 ("Telecommunications Act"),[2] to proceed promptly to establish reasonable rates for leased access to promote competition in delivery of diverse video programming. The cable operators' contention that the Commission's proposal would unduly burden cable systems is wholly without substance. The leased access provisions, affecting no more than 15% of existing channel capacity, which is rapidly being enlarged, will not have any significant effect on attractiveness of cable systems to subscribers.

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. § 521, *et seq.* (1992).

[2] Pub. L. No. 104-104, 110 Stat. 56.

Contrary to cable operator comments, the cost/market formula proposed by the Commission for setting leased access rates will neither have substantial impact on cable system profitability nor cause cable operators to lose subscribers through elimination of programming most highly valued by viewers. As cable programmers have recognized, a cable operator is most likely to replace programming that has failed to attract viewers. The biased research surveys submitted by some cable commenters in support of their claims are totally without credibility.

To meet concerns that the Commission's proposed cost formula is unduly complex, ValueVision proposes an alternative of a flat 10 cents per month per subscriber charge from which cable operators could depart based on a showing under the cost/market formula.

Comments supporting a transition period are not well taken. Allowing such a period would require continued delay in addressing evils that Congress directed the Commission to remedy promptly.

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To: The Commission

REPLY COMMENTS OF VALUEVISION INTERNATIONAL, INC.

ValueVision International, Inc. ("ValueVision") respectfully submits these reply comments in the above-captioned proceeding.

I. CABLE OPERATORS AND PROGRAMMERS ESSENTIALLY ASK THE COMMISSION TO REPEAL THE LEASED ACCESS REQUIREMENTS OF THE 1992 CABLE ACT THAT CONGRESS REAFFIRMED IN THE TELECOMMUNICATIONS ACT OF 1996.

Many of the cable MSOs and incumbent cable programmers who have filed comments in this proceeding essentially urge the Commission to continue to keep leased access from becoming the "genuine outlet"[1] intended in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). They urge the Commission to ignore "statutory mechanisms" of leased access for "statutory objectives" they assert are being satisfied

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[1] See S. Rep. No. 92, 102d Cong., 1st Sess. 79 (1991) ("Senate Report").

by monopoly cable operators.[2] They assert that leased access is "outdated and serves no public interest purpose," and that "Congress has determined (wrongly) that leased access will provide a public benefit." And they counsel against a "belated effort to revive the dying (or is it already dead) patient."[3]

These cable industry comments argue that the leased access reform of the 1992 Cable Act is not "an end in itself,"[4] that it is no longer necessary,[5] or that "other laws address any perceived need to provide competitive access to cable systems."[6] The ultimate shell game is the suggestion by NCTA and others that must carry is one such law[7] -- while simultaneously seeking to

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[2] Comments of Cable Programming Coalition of A&E Television Networks, The Courtroom Television Network, NBC Cable and Ovation at 26 ("A&E _et al._").

[3] Comments of Eternal Word Television Network at 2, 4, 7 ("Eternal Word").

[4] A&E _et al._ at 27.

[5] A&E _et al._ at 16; Eternal Word at 4; Comments of the Travel Channel at 12 ("Travel Channel"). Several commenters suggest that the limited number of leased access complaints that have been filed since the passage of the 1992 Cable Act indicates that the current leased access rules are working satisfactorily. _See_, _e.g._, A&E _et al._ at 44. To the contrary, because the highest implicit fee grants operators permission to charge exorbitant fees, the complaint procedure allows leased access programmers little recourse for successful challenges. Moreover, the complaints that have been filed illustrate the range of abuses that have occurred even under the existing formula.

[6] A&E _et al._ at 50-53.

[7] _See_ Joint Comments of Cable Television Operators and Request for Reconsideration at 18 & nn.25-26 (must carry is less (continued...)

overturn must carry by arguing to the Supreme Court that leased access is a less restrictive alternative.[8] Commenters Turner Broadcasting Systems ("TBS"), A&E, Black Entertainment Television ("BET"), E!, Lifetime, QVC, The Travel Channel, and the USA Networks all argue to the Supreme Court that "providing non-discriminatory access at a price set by an administrative agency is a frequently used solution in many fields."[9]

Such arguments against leased access fall of their own weight. As the Notice recognizes, the Commission is charged with implementing promptly[10] the leased access reforms dictated by

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[7](...continued) restrictive alternative) ("Cable Television Operators"); Comments of the National Cable Television Association, Inc. at 5 ("NCTA"); Opposition of USA Networks at 4 (LPTV stations have must carry rights) ("USA Networks").

[8] See Brief for Appellant National Cable Television Association, Inc. at 42, Brief for Appellants Turner Broadcasting System, Inc.; A&E Television Networks; Black Entertainment Television, Inc.; E! Entertainment Television, Inc.; International Family Entertainment, Inc.; Lifetime Entertainment Services; National Cable Satellite Corp.; QVC, Inc.; The Travel Channel, Inc.; USA Networks; Atlanta Interfaith Broadcasters, Inc. at 57-58, Turner Broadcasting System, Inc. v. FCC, No. 95-992 (U.S. filed April 26, 1996).

[9] Id.

[10] Based upon the Commission's "representation that it expects to resolve the issue at its March 21 meeting," the D.C. Circuit concluded that the delays to date in this proceeding are "not 'so egregious as to warrant mandamus.'" See ValueVision Comments at 16 n. 27. In light of this representation, ValueVision believes that it would be clearly inappropriate for the Commission to determine, as one report has indicated, to move needed reforms of leased access "to the back of the line." MultiChannel News, May 6, 1996, at 96.

the 1992 Cable Act, a statute that many cable industry commenters largely treat as if it were never passed.[11/] In their solicitude for the leased access provisions of the earlier 1984 Cable Act, these commenters simply ignore the Commission's 1990 conclusion that cable operators had effectively foreclosed the statutory right of leased access through the imposition of unreasonable rates and conditions,[12/] and the statutory response to that conclusion.

The 1992 Act modified the purpose of the leased access provision of the 1984 Act to include the promotion of "competition in the delivery of diverse sources of video programming." 47 U.S.C. § 532(a). It directed the Commission promptly to promulgate the rules at issue here, establishing maximum reasonable rates that a cable operator may charge such leased access programmers. See 47 U.S.C. § 532(c)(4)(B). And it amended the 1984 provision relied upon extensively by many cable commenters -- which had directed operators to establish "price, terms and conditions . . . at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system." See 47 U.S.C. § 532(c)(1). The 1992 amendment to this provision now

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11/ Indeed, A&E et al. actually rely upon the dissent to the committee reports on that statute. See A&E et al. at 15, 20.

12/ Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962, 5046-51 (1990) ("1990 Report").

requires operators to accommodate this goal to the new purpose of promoting competition, and specifically to the Commission's rate-capping rules.[13/]

There can be no doubt of what the 1992 Act intended here. Congress viewed leased access as a way "to remedy market power in the cable industry" and to "act as a safety valve for programmers who may be subject to a cable operator's market power and who may be denied access [or] be given access on unfavorable terms."[14/] And the 1992 Act reforms were not intended to permit leased access only on the cable industry's terms, as the 1984 Act had done. Rather, Congress intended for the Commission to change its leased access rules so as to make leased access a "genuine outlet for programmers."[15/]

[13/] See 47 U.S.C. § 532(c)(1) (providing that "the cable operator shall establish, consistent with the purpose of this section and with rules prescribed by the Commission under paragraph (4), the price, terms, and conditions of such [leased access] use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system") (emphasis added to indicate language added in 1992)).

[14/] Senate Report at 30. Cable commenters cite the Senate Report for the proposition that "the economics of leased access are not conducive to its use." E.g. Comments of Outdoor Life Network, Speedvision Network, The Golf Channel, BET on Jazz, at 7 ("Outdoor Life") (citing Senate Report at 31-32). This completely misses the point. Congress was criticizing, not endorsing, that state of affairs. As noted above, it directed the Commission to change it so as to make leased access a "genuine outlet."

[15/] Senate Report at 79.

Contrary to the suggestions of certain cable commenters, the Telecommunications Act of 1996 ("Telecommunications Act") did not alter in any way the leased access mandate of the 1992 Cable Act. Quite the contrary. The legislative history of the Telecommunications Act indicates that Congress considered and rejected provisions that would have permitted the Commission to eliminate or modify leased access requirements. The House version of the bill as reported out of committee not only would have modified leased access requirements for any cable operator "that has installed a switched, broadband video programming delivery system," but also would have required that the Commission consider replacing the leased access obligations of all other cable operators.[16] However, Congress decided in the 1996 Act not to alter the leased access provisions of the 1992 Act.

Indeed, instead of abolishing the leased access requirements, the Telecommunications Act extended them to all other providers of video programming acting under Title VI of the Act. See 47 U.S.C. § 571(a)(3)(A). Moreover, contrary to the suggestions of certain cable MSOs that they have been singled out for discriminatory treatment,[17] Congress imposed more extensive

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[16] H.R. Rep. No. 104-204, Part I, 104th Cong., 1st Sess. 115-16 (proposing to add §§ 653(b)(2) & (d) to the Communications Act).

[17] See, e.g., Comments of C-SPAN and C-SPAN 2 at 6 ("C-SPAN"); NCTA at 14.

leased access type regulations on common carriers that elect to operate as open video systems ("OVS").[18] In sum, the 1984 Cable Act provisions on leased access to which cable commenters consistently refer were reformed in the 1992 Cable Act and the reformed provisions were endorsed in the 1996 Act. It is clearly time to implement those reforms without further delay.

II. THE COMPETITIVE AND DIVERSITY CONCERNS THAT CONGRESS RECOGNIZED IN ENACTING THE 1992 CABLE ACT CONTINUE UNABATED IN 1996.

Congress enacted the leased access provisions of the 1992 Act in response to concerns about the lack of competition in the market for the delivery of programming services, and the lack of diversity of programming sources. Contrary to the repeated assertions of cable industry commenters that the central assumption of leased access no longer exists, neither concern has been rectified since that time.

The rhetoric of these commenters about the "rapidly escalating competition" in the market for delivery of video programming bears little relation to reality.[19] Indeed, as noted in its opening comments, ValueVision's own experience

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[18] Neither an operator of an OVS nor its affiliates may select the video programming services for carriage on more than one-third of activated channel capacity on such system if demand for carriage exceeds the channel capacity of the system. 47 U.S.C. § 573(b)(1)(B).

[19] See Comments of Time Warner Cable at 15-18 ("Time Warner"); see also, e.g., Comments of Continental Cablevision, Inc. at 7 ("Continental"); C-SPAN at 6.

belies the cable operators' claims. Since the Commission's original leased access rules went into effect, ValueVision has actually lost access to some 900,000 subscribers on cable systems affiliated with competing program services QVC and HSN -- despite endorsements of ValueVision's programming by local cable system general managers. This is precisely the kind of anticompetitive conduct by vertically integrated monopolists that the 1992 Act reform of leased access was designed to prevent, and that the Supreme Court recognized in Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2466 (1994).[20/]

There can be no question that cable operators continue to maintain market power. As the Commission made clear in the 1995 Competition Report, which cable commenters repeatedly cite incorrectly, cable systems now account for 91% of all multichannel video programming distributor subscribership.[21/] This market share precludes any conclusion "that a competitive market currently exists for the delivery of video programming."[22/] The suggestion that providing leased access over a mere 10 to 15% of a portion of cable systems' channel capacity will "disarm cable operators in their fight to compete

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[20/] See also id. at 2474 (Stevens, J., concurring).

[21/] Annual Assessment of the Status of Competition in the Market for the Delivery Video Programming, 11 FCC Rcd 2060, 2063 (1995) ("1995 Report").

[22/] Id. at 4-5.

in the marketplace"[23] is simply preposterous, given their market power and continuing efforts to suppress the very competition on which they purport to rely.[24] And for A&E et al. actually to suggest that leased access is no longer necessary because programmers can instead seek carriage from OVS providers is truly remarkable. Cable operators' "fight to compete in the marketplace" has included aggressive support of even more stringent carriage obligations for OVS operators.[25] The reality is that OVS does not exist.

Certain MSOs commenting in this proceeding assert that providing leased access will prevent them from selecting the most valuable package of programming for their subscribers.[26] Until there is a competitive market for the delivery of video programming services, however, operators' packaging decisions need not and will not be driven by consumer preferences. They will be informed by the goal of maximizing monopoly profits. Vertically integrated cable operators have clear economic incentives to discriminate in favor of affiliated programming

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23/ See Cable Television Operators at 14.

24/ See Linda Haugsted, TCI Asks for Shutdown of PacBell VDT System, Multichannel News, May 28, 1996.

25/ For example, see the Comments of Continental Cablevision, Inc., Time Warner Cable, and Telecommunications, Inc., filed on April 1, 1996, in Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket No. 96-46.

26/ See, e.g., Continental at 12-22.

services, which, despite the claims of cable operators, account for 51% of all national services today.[27] It is precisely this ability and incentive to discriminate that Congress sought to redress by enacting the leased access requirements.

Cable commenters also assert that diversity of programming sources is unnecessary because cable MSOs select diverse programming on their own.[28] They note that "more than 128 different national and niche programmers now compete for access to cable subscribers."[29] These assertions are misleading, however, given the high failure rate of such networks.[30] Moreover, very few networks that are unaffiliated with cable operators have any real chance of gaining carriage today. In the words of one programming CEO, "[i]f you didn't spring from the brain of an executive of [a multiple system operator] and you're an independent, you're in a different

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27/ 1995 Report, 11 FCC Rcd at 2063-64.

28/ Continental at 33; C-SPAN at 5-8; Comments of Tele-Communications, Inc. and Request for Further Reconsideration, at 12-14 ("TCI"); Outdoor Life at 12-17; Comments of Viacom, Inc. at 7-9 ("Viacom").

29/ Travel Channel at 12.

30/ Only 8 of 133 cable networks that were proposed last year were actually launched in even a limited way. Hope Springs Eternal For Growing List of Planned Cable Networks, Communications Daily, Apr. 29, 1996, at 3.

ballgame."[31] More importantly, Congress sought to maximize the diversity of "information sources" -- not the supposed diversity of MSO-selected programming.[32] Leased access reform is vital to accomplish that objective.

III. LEASED ACCESS REQUIREMENTS IMPOSE MINIMAL BURDENS ON CABLE OPERATORS.

Some cable operators who have commented in this proceeding dramatically overstate the impact of meaningful leased access requirements. The leased access provisions affect a mere 10 to 15% of operators' otherwise uncommitted channel capacity -- a portion that, as noted above, is far less than their future OVS competitors will be required to reserve.[33]

Moreover, this 10-15% is a portion of capacity on cable systems that are continuously expanding. Cable MSOs make virtually no mention of their own plans to upgrade their systems in order to offer such expanded capacity.[34] The one group of

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[31] Wayne Walley, Ecology Channel Finds Cable Tough Turf For New Networks, Electronic Media, Apr. 29, 1996, at 13; see also Michael Katz, New Networks Fight For Space, Broadcasting & Cable, Apr. 29, 1996, at 61.

[32] See 47 U.S.C. § 532(a).

[33] Moreover, if the many cable commenters who predict that leased access requests will proliferate after the adoption of the Commission's proposed rules are correct, operators will quickly meet their set-aside requirements. They may then set leased access fees at the market rate, which they appear to find acceptable.

[34] But see Comments of Buckeye Cablevision, Inc. at 5 (acknowledging plan to increase channel capacity); Continental at 19.

programmers that provides any real data on increases in the channel capacity of MSOs produces unreliable and out of date figures.[35] In fact, "[a]pproximately 32% of the nation's cable systems have been upgraded to 750 mhz/550 mhz, permitting transmission of up to 83 channels and 116 channels, respectively."[36] Commenters in this proceeding are among those completing rebuilds of their systems. For instance, Adelphia has nearly completed a $33 million rebuild of its Toms River system, which will have the capacity to provide more than 100 analog and 200 digital channels.[37]

Other MSOs have also begun expanding their system capacity pursuant to FCC-approved "social contracts." Pursuant to such plans, operators have gained substantial flexibility in setting rates for new regulated services -- such as new service

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[35] See Comments of Outdoor Life, Exhibit 6. The exhibit cites to Warren's Television and Cable Factbook, but assumes average channel capacity nowhere documented there or elsewhere. Statistics in that source demonstrate that the percent of cable systems with 54 channels or more has increased by 19.3% between 1993 and 1995. See Warren Publishing, Inc., Television & Cable Factbook, Services No. 62, 1994 Ed. at F-3; Warren Publishing, Inc., Television & Cable Factbook, Services No. 64, 1996 Ed. at 1-81.

[36] Rich Brown, Request To Add 30 Channels: TCI's Digital Delivery Will Make Possible Near-Video-On-Demand, Broadcasting & Cable, May 27, 1996, at 30.

[37] Broadcasting & Cable, May 27, 1996, at 69.

tiers offering additional channels.[38] Under the terms of its FCC-approved social contract, Continental is required "to invest at least $1.35 billion to rebuild and upgrade all of its domestic systems between 1995 and 2000."[39] Time Warner has similarly committed to invest $4 billion in system rebuilds and upgrades, including increased channel capacity, during the same period.[40] Local franchise authorities also often require operators to make upgrade commitments as a condition of franchise renewals.[41] The availability of additional channel capacity will further minimize the impact of the leased access requirements on operators' ability to select programming.

38/ See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Resolution, Second Report and Order, First Order On Reconsideration, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 2220, 2278-84 (1996); see also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Resolution, Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd 4527, 4677-80 (1994) (adopting the Upgrade Incentive Plan).

39/ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Second Report and Order, First Order On Reconsideration, and Further Notice of Proposed Rulemaking, 11 FCC Rcd at 2282.

40/ Id.

41/ See Continental, Stengel Affidavit at 16 (acknowledging that renewals are often conditioned on the launch of new channels).

IV. WITH MODIFICATIONS SUGGESTED BY VALUEVISION AND OTHERS, THE COMMISSION'S COST/MARKET FORMULA REASONABLY ACCOMMODATES THE NEED TO MAKE LEASED ACCESS A "GENUINE OUTLET" TO THE GROWTH AND DEVELOPMENT OF CABLE SYSTEMS.

Contrary to the suggestion of some of the commenters, the 1992 Cable Act nowhere provides that leased access channels are to be profit leaders. Although it has no statutory obligation to do so, the Commission has proposed a formula that allows operators to recover the costs of providing such channels, as well as a reasonable profit. Nowhere have any parties to this proceeding demonstrated that the proposed formula threatens the growth or development of cable systems -- any more than they were able to document a similar contention with respect to their must carry obligations.

Several cable operators and programmers first suggest that leased access programmers are seeking a "free ride" off popular cable networks and program packages.[42/] Continental, for example, makes a lengthy shopping mall analogy, suggesting that cable systems use well-known cable networks as "anchor tenants" in a video shopping mall, to attract a large base of customers, who will then sample the other "stores," i.e. the specialty cable

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[42/] See, e.g., Cable Television Operators at 16-17; NCTA at 12; Joint Comments of Turner Broadcasting System, Inc., News Corporation, LTD., and C-SPAN On Further Notice of Proposed Rulemaking at 6 ("TBS").

channels.[43/] TBS's economists adopt the same analogy,[44/] which suffers from three obvious weaknesses.

First, as demonstrated above, <u>there are no other "malls" at which cable subscribers can shop</u>. Cable operators serve over 90% of all subscribers to video programming services. Second, cable operators already have a free ride. The real "anchor tenants" are the local broadcast stations that consistently attract the majority of cable viewers. The four broadcast networks alone boast a viewing share of 66% of the cable audience.[45/] And, as the Community Broadcasters Association notes, under the terms of their statutory compulsory copyright license, cable MSOs pay nothing to ride free on such local broadcasts.[46/] Third, there is no justifiable reason why the specialty stores in the mall should be chosen by cable operators rather than market forces. ValueVision's experience

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43/ Continental, Affidavit of Robert A. Stengel, at 4-7, 10-11.

44/ TBS, Attachment at 18.

45/ <u>Mass Media</u>, Communications Daily, May 23, 1996, at 7 (reported by the Cable Ad Bureau, based on Nielson data for the viewing patterns during the May Sweeps -- a 28-day period); <u>Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service</u>, Fifth Further Notice of Proposed Rulemaking, MM Docket No. 87-268, at ¶ 64 & n.68 (released May 20, 1996) (reporting that "[i]n the 1993/1994 television season, almost 60 percent of all television viewing in cable TV homes was of broadcast television stations").

46/ <u>See</u> Comments of the Community Broadcasters Association at 9 n.15.

with vertically integrated cable operators is that they both favor programmers with whom they share ownership and undermine competitors of those programmers. ValueVision reaches 13.9 million homes -- largely through affiliations with cable MSOS that do not have interests in QVC or HSN.[47]

Cable commenters also complain that adding leased access programmers will disrupt existing programming line-ups and thereby create customer dissatisfaction.[48] But cable operators have not demonstrated any similar reluctance to adjust their programming packages to add non-leased access programmers. Indeed, NCTA itself has acknowledged that "[t]hese alterations are likely to be especially frequent as the supply of available programming greatly increases."[49] Moreover, cable penetration has actually increased, despite similar predictions of disruption resulting from the imposition of must carry requirements.[50] Cable operators offer no data demonstrating that they have lost subscribers due to such alleged disruptions.

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[47] ValueVision Reports Record First Quarter Results, News Bulletin FRB, May 23, 1996, at 2.

[48] See, e.g., A&E et al. at 33-35; Comments of Discovery Communications, Inc. at 13-14 ("Discovery"); Time Warner at 7-8.

[49] Brief for Appellant National Cable Television Association, Inc., at 20 n.5, Turner Broadcasting System, Inc. v. FCC, No. 95-992 (U.S. filed Apr. 26, 1996).

[50] 1995 Report, 11 FCC Rcd at 2060.

Commenters who argue that the cost formula fails adequately to compensate operators[51] and subsidizes leased access programmers[52] rely on a critical but wholly unsupported assumption -- that cable operators will lose subscribers by adding leased access programming.[53] This is the same scare tactic that preceded must carry, and it has no more probative value here. As cable operators' own economists indicate, any such costs would be "exceedingly difficult to measure."[54] Moreover, Continental's Senior Vice President of Programming and Advertising concedes that it is "impossible to separate the impact on a cable system of particular programming decisions from other important factors, such as price, advertising and promotional efforts, and changing consumer tastes."[55]

51/ See, e.g., Comments of Comcast Cable Communications, Inc. ("Comcast"); NCTA at 10-15; TCI at 12-14.

52/ See, e.g., A&E et al. at 28-29; Comments of Liberty Sports, Inc. at 2-4 ("Liberty Sports").

53/ Several commenters challenge the Commission's tentative conclusion that the implicit fee model allows cable operators to exact a double recovery. See, e.g., Comments of Adelphia Communications Corp. et al. at 6-8 ("Adelphia"); Comcast at 11; Comments of Cox Communications, Inc ("Cox") at 4-7. This argument, as well, is based on the assumption that operators will lose subscribers by adding leased access channels.

54/ TCI, Besen/Murdoch Report at 14; see also Adelphia at 17 (stating that "the true cost [of providing leased access] to the cable operator cannot be quantified").

55/ Continental, Stengel Affidavit at 13.

Contrary to what these commenters suggest,[56] adopting the cost/market formula will not cause operators to remove programming that consumers value most highly. Nor will programming necessarily be replaced with less popular services.[57] First, if they act according to their own economic self interest, operators will drop only that programming that contributes the least to the value of their systems. As experience with must carry and retransmission consent demonstrates, cable operators will not remove programming services that contribute to subscribership. Indeed, cable programmers themselves concede that "[i]t is highly unlikely that programming services with loyal viewers, such as HBO, CNN, or USA, would be dropped."[58] Rather, operators are likely to delete those programming services that "have yet to develop a strong subscriber viewership."[59] The example of C-SPAN is

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56/ See, e.g., Outdoor Channel at 22; Travel Channel at 5-9; USA Networks at 1.

57/ Moreover, contrary to the suggestion of some commenters (see, e.g., Cox at 16; Liberty Sports at 3), the cost formula will not set the operator's compensation at zero. The opportunity cost formula recognizes various incentives provided in exchange for carriage. For instance, new cable network TV Land has offered cable affiliates three minutes of local advertising to sell and has agreed to refrain from selling national advertising until it has reached 20 million homes or until October 1997, whichever is sooner. See, e.g., Richard Katz, Two Launches in Contrast: TV Land and Ovation, Multichannel News, Apr. 29, 1996, at 66.

58/ Comments of Prevue Networks, Inc. at 4 ("Prevue").

59/ Liberty Sports at 4; see also, e.g., Prevue at 4.

instructive. Although operators argued that must carry requirements would force them to drop this popular public affairs programming, C-SPAN remains available in over 67.1 million households and C-SPAN 2 in over 44.4 million households.[60/]

Programmers argue that adoption of the cost/market formula will cause cable operators to drop their new niche programming networks.[61/] There is no apparent reason why such networks should be favored over their leased access competitors. The Commission has made clear that in implementing the 1992 Cable Act, it seeks to promote competition, not competitors.[62/] As the comments of programmers demonstrate,[63/] leased access programmers and affiliated cable networks alike require the opportunity for nationwide carriage if they are to be successful. Competition is not served by facilitating the carriage of unpopular incumbent cable programming[64/] at the expense of granting carriage to

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60/ C-SPAN at 1 n.1.

61/ See, e.g., Liberty Sports at 4; Prevue at 4; Comments of Rainbow Programming Holdings, Inc. On Further Notice of Proposed Rulemaking at 8-11 ("Rainbow").

62/ Implementation of Cable Television and Consumer Protection and Competition Act of 1992, 10 FCC Rcd 1902, 1950 (1994).

63/ See, e.g., Outdoor Life at 22-24; Travel Channel at 7.

64/ See Richard Katz, Cable Ratings Continued to Soar in 1Q, Multichannel News, Apr. 1, 1996, at 16.

leased access programmers who are willing to pay for such carriage.

Second, contrary to the suggestion of some commenters that adopting the cost/market formula will result in the proliferation of home shopping networks,[65] a diverse group of independent programmers have filed comments indicating that they would seek carriage if leased access were a "genuine outlet." Such programmers include the United States Catholic Conference,[66] the Game Show Network, Telemiami (a Spanish and Portuguese language programmer in Miami), Blab TV (a provider of live local programming), and various low power television stations that provide highly localized programming unavailable on other stations.[67] And, if the Commission allows resale, an even

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[65] E.g. A&E et al. at 39; C-SPAN at 7; Outdoor Channel at 20-22.

[66] The Conference seeks to provide religious programming. See Comments of Center for Media Education, Alliance for Community Media, Association of Independent Video and Filmmakers, Consumer Federation of America, National Association of Artists' Organizations, United States Catholic Conference at 6 n.6 ("CME").

[67] Indeed Shop At Home, Inc., the only other home shopping network to file comments in this proceeding, opposes reform of the Commission's implicit fee formula. See Comments of Shop at Home, Inc. Its explicit reason for doing so is to minimize competition in the home shopping market. The promotion of competition, however, is the explicit goal Congress attempted to achieve through the leased access provisions. We note that Shop at Home recently announced a long-term carriage agreement with TCI. Shopping for Subs, Broadcasting & Cable TV Fax, May 3, 1996. Whether the terms of that agreement permit TCI to terminate carriage without cause is unclear.

wider variety of programming providers may be able to afford access, as discussed below.

The suggestion of cable commenters that home shopping channels do not add value to programming packages is disingenuous in any event. QVC and HSN, the home shopping programmers that dominate the market, are affiliates of two major cable operators carried widely on their systems. Moreover, a number of other popular cable channels include substantial blocks of time devoted to infomercials. In any case, the Commission has long recognized that the public interest is best served by allowing market forces and competition to promote diversity in entertainment formats.[68]

To support its theory that adding leased access channels will reduce subscriber revenues, Continental relies on the polling of its own employees, which obviously cannot be taken seriously.[69] Continental and TCI also rely on the results of customer surveys whose methodology has all the reliability of a political push-poll.

The research group that conducted TCI's survey began its questioning regarding the proposed leased access rules by reading customers a list of the cable networks that they said

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[68] See Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations, Memorandum Opinion and Order, 60 F.C.C.2d 858 (1976) (declining to consider programming formats in ruling on applications for license renewals or transfers), recon. denied, 66 F.C.C.2d 78 (1977); aff'd sub nom. FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

[69] See Continental at 9 & Stengel Affidavit at 15.